IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NATHAN SMITH	§	
	§	
vs.	§	Civil Action No. 4:07-00784
	§	
THE ABANDONED VESSEL, *in rem*	§	

INTERVENOR SORENSON'S REPLY

TO THE HONORABLE JUDGE OF THE COURT:

Intervenor Marie Sorenson files this reply to Plaintiff Smith's Response [DKT# 029] to Sorenson's Motion to Dismiss for Lack of Jurisdiction and alternatively For Failure to State a Claim [DKT# 021] and shows the Court:

PLAINTIFF SMITH HAS THE BURDEN ON JURISDICTION

1. "Federal courts have limited subject matter jurisdiction and cannot entertain cases unless authorized by the Constitution and legislation. Coury v. Prot, 85 F.3d 244, 248 (5th Cir. 1996). There is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court. Id. Accordingly, a party invoking the jurisdiction of a federal court has the burden of proving that the exercise of such jurisdiction is proper." Roby v. State Farm Fire & Cas. Co., 464 F.Supp.2d 572, 575 (E.D. La. 2006).

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2. To bring this salvage claim in admiralty, Plaintiff Smith has the burden to prove that, among other things, the supposed vessel is located in navigable waters. See, Historic Aircraft Recov. Corp. v. Wrecked and Abandoned Voight F4U-1 Corsair Aircraft, 294 F.Supp.2d 132, 135-6 (D. Me. 2003)("[T]he Court concludes that an object that is subject to salvage must be located in navigable waters."); see, also, other cases cited by Smith in DKT# 029, paragraph 11. If Smith's "vessel" is on Sorenson's land and not in navigable waters, there is no admiralty

jurisdiction. See, Tidewater Salvage, Inc. v. Weyerhauser Co., 633 F.2d 1304, 1306 n.6 (9th Cir. 1980)("On land the person who rushes in to save another's property from danger is an officious intermeddler, the volunteer whom even equity will not aid." quoting G. Gilmore & C. Black, The Law of Admiralty 532 (2d ed. 1975)).

3. The seminal definition on navigable waters is:

> "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

The Daniel Ball, 77 U.S. 557, 563 (1870). "A waterway is navigable provided that it is used or susceptible of being used as an artery of commerce. [citation omitted]. Neither non-commercial fishing nor pleasure boating nor water skiing constitutes commerce. Commerce for the purpose of admiralty jurisdiction means activities related to the business of shipping. ... It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'" Adams v. Montana Power Co., 528 F.2d 437, 439 (9th Cir. 1975)(quoting United States v. The Montello, 87 U.S. (20 Wall.) 430, 442 (1874)). To bring his case within this Court's admiralty jurisdiction, Plaintiff Smith must prove that the vessel lies in waters that are accessible by commercial shipping.

4. Plaintiff pleads that the supposed vessel is located in the vicinity of the Mission River but does not plead that it is located in navigable waters. See, DKT# 001. Additionally,

Plaintiff's Declaration only states that the vessel is under water, that he has been to the vessel by boat, and that a person could travel from the vessel to the Mission River and thence to the Gulf of Mexico and intracoastal waterways to other states. See, Declaration, DKT# 030. Nowhere does he state that the vessel is located in waters that are accessible for commercial water traffic or that the route from the vessel to the Mission River and thence to the Gulf of Mexico is accessible for commercial water traffic. Read literally, Plaintiff's Declaration does not even state that travel from the vessel to the Mission River is possible by boat of any sort, much less a commercial vessel. Neither Plaintiff's Complaint nor his Declaration meet his burden of proof on the site of the supposed shipwreck so as to invoke this Court's admiralty jurisdiction. This cause should be dismissed for lack of subject matter jurisdiction.

WHEREFORE, Intervenor Marie Sorenson requests the Court dismiss this case for want of jurisdiction, alternatively dismiss this case for failure to state a claim, or alternatively enter judgment that Plaintiff take nothing by his claims and that Intervenor recover such other and further relief as to which she may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served on all parties in accordance with the Federal Rules of Civil Procedure on November 27, 2007.

Terry M. Carroll, Jr.